

# **Revisiting the Autonomous Contract - Transnational contract law, trends and supportive structures**

Ralph Amissah

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1 **Revisiting the Autonomous Contract - Transnational**  
2 **contract law, trends and supportive structures,**  
3 **Ralph Amissah\***

4 **1. Reinforcing trends: borderless technologies, global**  
5 **economy, transnational legal solutions?**

6 Revisiting the Autonomous Contract<sup>1</sup>

7 Globalisation is to be observed as a trend intrinsic to the world  
8 economy.<sup>2</sup> Rudimentary economics explains this runaway process,

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<sup>1</sup>*The Autonomous Contract: Reflecting the borderless electronic-commercial environment in contracting* was published in *Elektronisk handel - rettslige aspekter, Nordisk årsbok i rettsinformatikk 1997* (Electronic Commerce - Legal Aspects. The Nordic yearbook for Legal Informatics 1997) Edited by Randi Punsvik, or at <<http://www.jus.uio.no/lm/the.autonomous.contract.07.10.1997.amissah/doc.html>>

<sup>2</sup>As Maria Cattaui Livanos suggests in *The global economy - an opportunity to be seized* in *Business World* the Electronic magazine of the International Chamber of Commerce (Paris, July 1997) at

<<http://www.iccwbo.org/html/globalec.htm>>

“Globalization is unstoppable. Even though it may be only in its early stages, it is already intrinsic to the world economy. We have to live with it, recognize its advantages and learn to manage it.

That imperative applies to governments, who would be unwise to attempt to

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<<http://lexmercatoria.org/>>

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[This is a draft document and subject to change.]

All errors are very much my own.

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as being driven by competition within the business community to achieve efficient production, and to reach and extend available markets.<sup>3</sup> Technological advancement particularly in transport and communications has historically played a fundamental role in the furtherance of international commerce, with the Net, technology’s latest spatio-temporally transforming offering, linchpin of the “new-economy”, extending exponentially the global reach of the business community. The Net covers much of the essence of international commerce providing an instantaneous, low cost, convergent, global and borderless: information centre, marketplace and channel for communications, payments and the delivery of services and intellectual property. The sale of goods, however, involves the separate element of their physical delivery. The Net has raised a plethora of questions and has frequently offered solutions. The increased transparency of borders arising from the Net’s ubiquitous nature results in an increased demand for the transparency of operation. As economic activities become increasingly global, to reduce transaction costs, there is a strong incentive for the “law” that provides for them, to do so in a similar dimension. The appeal of transnational legal solutions lies in the potential reduction in complexity, more widely dispersed expertise, and resulting increased transaction efficiency. The Net reflexively offers possibilities for the development of transnational legal solutions, having in a similar vein transformed the possibilities for the promulgation of texts, the sharing of ideas and collaborative ventures. There are however, likely to be tensions within the legal community protecting entrenched practices against that which is new, (both in law and technology) and the business community’s goal to reduce transaction costs.

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stem the tide for reasons of political expediency. It also goes for companies of all sizes, who must now compete on global markets and learn to adjust their strategies accordingly, seizing the opportunities that globalization offers.”

<sup>3</sup>To remain successful, being in competition, the business community is compelled to take advantage of the opportunities provided by globalisation.

5 Within commercial law an analysis of law and economics may assist in developing a better understanding of the relationship between commercial law and the commercial sector it serves.<sup>4</sup> “[T]he importance of the interrelations between law and economics can be seen in the twin facts that legal change is often a function of economic ideas and conditions, which necessitate and/or generate demands for legal change, and that economic change is often governed by legal change.”<sup>5</sup> In doing so, however, it is important to be aware that there are several competing schools of law and economics, with different perspectives, levels of abstraction, and analytical consequences of and for the world that they model.<sup>6</sup>

6 Where there is rapid interrelated structural change with resulting new features, rather than concentrate on traditionally established tectonic plates of a discipline, it is necessary to understand underlying currents and concepts at their intersections, (rather than expositions of history<sup>7</sup>), is the key to commencing meaningful dis-

<sup>4</sup>Realists would contend that law is contextual and best understood by exploring the interrelationships between law and the other social sciences, such as sociology, psychology, political science, and economics.

<sup>5</sup>Part of a section cited in Mercurio and Steven G. Medema, *Economics and the Law: from Posner to Post-Modernism* (Princeton, 1997) p. 11, with reference to Karl N. Llewellyn *The Effect of Legal Institutions upon Economics*, *American Economic Review* 15 (December 1925) pp 655-683, Mark M. Litchman *Economics, the Basis of Law*, *American Law Review* 61 (May-June 1927) pp 357-387, and W. S. Holdsworth *A Neglected Aspect of the Relations between Economic and Legal History*, *Economic History Review* 1 (January 1927-1928) pp 114-123.

<sup>6</sup>For a good introduction see Nicholas Mercurio and Steven G. Medema, *Economics and the Law: from Posner to Post-Modernism* (Princeton, 1997). These include: Chicago law and economics (New law and economics); New Haven School of law and economics; Public Choice Theory; Institutional law and economics; Neoinstitutional law and economics; Critical Legal Studies.

<sup>7</sup>Case overstated, but this is an essential point. It is not be helpful to be overly tied to the past. It is necessary to be able to look ahead and explore new solutions, and be aware of the implications of “complexity” (as to the relevance of past circumstances to the present).

cussions and developing solutions for the resulting issues.<sup>8</sup> Inter-related developments are more meaningfully understood through interdisciplinary study, as this instance suggests, of the law, commerce/economics, and technology nexus. In advocating this approach, we should also pay heed to the realisation in the sciences, of the limits of reductionism in the study of complex systems, as such systems feature emergent properties that are not evident if broken down into their constituent parts. System complexity exceeds subsystem complexity; consequently, the relevant unit for understanding the systems function is the system, not its parts.<sup>9</sup> Simplistic dogma should be abandoned for a contextual approach.

## 2. Common Property - advocating a common commercial highway 7

Certain infrastructural underpinnings beneficial to the working of the market economy are not best provided by the business community, but by other actors including governments. In this paper mention is made for example of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 10 June 1958), which the business community regularly relies upon as the back-stop for their international agreements. Common property can have an enabling value, the Net, basis for the “new” economy, would not be what it is today without much that has 8

<sup>8</sup>The majority of which are beyond the scope of this paper. Examples include: encryption and privacy for commercial purposes; digital signatures; symbolic ownership; electronic intellectual property rights.

<sup>9</sup>Complexity theory is a branch of mathematics and physics that examines non-linear systems in which simple sets of deterministic rules can lead to highly complicated results, which cannot be predicted accurately. A study of the subject is provided by Nicholas Rescher *Complexity: A Philosophical Overview* (New Brunswick, 1998). See also Jack Cohen and Ian Stewart, *The Collapse of Chaos: Discovering Simplicity in a Complex World* (1994).

been shared on this basis, having permitted “*Metcalf’s law*”<sup>10</sup> to take hold. *Metcalf’s law* suggests that the value of a shared technology is exponential to its user base. In all likelihood it applies as much to transnational contract law, as to technological networks and standards. The more people who use a network or standard, the more “valuable” it becomes, and the more users it will attract. Key infrastructure should be identified and common property solutions where appropriate nurtured, keeping transaction costs to a minimum.

9 The following general perspective is submitted as worthy of consideration (and support) by the legal, business and academic communities, and governments. \*(a)\* Abstract goals valuable to a transnational legal infrastructure include, certainty and predictability, flexibility, simplicity where possible, and neutrality, in the sense of being without perceived “unfairness” in the global context of their application. This covers the content of the “laws” themselves and the methods used for their interpretation. \*(b)\* Of law with regard to technology, “rules should be technology-neutral (i.e., the rules should neither require nor assume a particular technology) and forward looking (i.e., the rules should not hinder the use or development of technologies in the future).”<sup>11</sup> \*(c)\* Desirable abstract goals in developing technological standards and critical technological infrastructure, include, choice, and that they should be shared and public or “open” as in “open source”, and platform and/or program neutral, that is, interoperable. (On security, to forestall suggestions to the contrary, popular open source software tends to be as secure or more so than proprietary software). \*(d)\* Encryption is an essential part of the mature “new” economy but remains the subject of some governments’ restriction.<sup>12</sup> The avail-

<sup>10</sup>Robert Metcalf, founder of 3Com.

<sup>11</sup>*US Framework for Global Electronic Commerce* (1997)

<<http://www.whitehouse.gov/WH/New/Commerce/>>

<sup>12</sup>The EU is lifting such restriction, and the US seems likely to follow suit.

ability of (and possibility to develop common transnational standards for) strong encryption is essential for commercial security and trust with regard to all manner of Net communications and electronic commerce transactions, *vis-à-vis* their confidentiality, integrity, authentication, and non-repudiation. That is, encryption is the basis for essential commerce related technologies, including amongst many others, electronic signatures, electronic payment systems and the development of electronic symbols of ownership (such as electronic bills of lading). \*(e)\* As regards the dissemination of primary materials concerning “uniform standards” in both the legal and technology domains, “the Net” should be used to make them globally available, free. Technology should be similarly used where possible to promote the goals outlined under point (a). Naturally, as a tempered supporter of the market economy,<sup>13</sup> proprietary secondary materials and technologies do not merit these reservations. Similarly, actors of the market economy would take advantage of the common property base of the commercial highway.

### 3. Modelling the private international commercial law infrastructure

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Apart from the study of “laws” or the existing legal infrastructure, there are a multitude of players involved in their creation whose efforts may be regarded as being in the nature of systems modelling. Of interest to this paper is the subset of activity of a few organisations that provide the underpinnings for the foundation of a successful transnational contract/sales law. These are not amongst

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<sup>13</sup>Caveats extending beyond the purview of this paper. It is necessary to be aware that there are other overriding interests, global and domestic, that the market economy is ill suited to providing for, such as the environment, and possibly key public utilities that require long term planning and high investment. It is also necessary to continue to be vigilant against that which even if arising as a natural consequence of the market economy, has the potential to disturb or destroy its function, such as monopolies.

the more controversial legal infrastructure modelling activities, and represent a small but significant part in simplifying international commerce and trade.<sup>14</sup>

<sup>12</sup> Briefly viewing the wider picture, several institutions are involved as independent actors in systems modelling of the transnational legal infrastructure. Their roles and mandates and the issues they address are conceptually different. These include certain United Nations organs and affiliates such as the United Nations Commission on International Trade Law (*UNCITRAL*),<sup>15</sup> the World Intellectual Property Organisation (WIPO)<sup>16</sup> and recently the World Trade Organisation (WTO),<sup>17</sup> along with other institutions such as the International Institute for the Unification of Private Law (*UNIDROIT*),<sup>18</sup> the International Chamber of Commerce (ICC),<sup>19</sup> and the Hague Conference on Private International Law.<sup>20</sup> They identify areas that would benefit from an international or transnational regime and use various tools at their disposal, (including: treaties; model laws; conventions; rules and/or principles; standard contracts), to develop legislative “solutions” that they hope will be subscribed to.

<sup>13</sup> A host of other institutions are involved in providing regional solutions.<sup>21</sup> Specialised areas are also addressed by appropriately specialised institutions.<sup>22</sup> A result of globalisation is increased compe-

<sup>14</sup>Look for instance at national customs procedures, and consumer protection.

<sup>15</sup><http://www.uncitral.org/>

<sup>16</sup><http://www.wipo.org/>

<sup>17</sup><http://www.wto.org/>

<sup>18</sup><http://www.unidroit.org/>

<sup>19</sup><http://www.iccwbo.org/>

<sup>20</sup><http://www.hcch.net/>

<sup>21</sup>such as ASEAN <http://www.aseansec.org/> the European Union (EU) <http://europa.eu.int/> MERCOSUR <http://embassy.org/uruguay/econ/mercosur/> and North American Free Trade Agreement (NAFTA) <http://www.nafta-sec-alena.org/english/nafta/>

<sup>22</sup>e.g. large international banks; or in the legal community, the Business

tion (also) amongst States, which are active players in the process, identifying and addressing the needs of their business communities over a wide range of areas and managing the suitability to the global economy of their domestic legal, economic, technological and educational<sup>23</sup> infrastructures. The role of States remains to identify what domestic structural support they must provide to be integrated and competitive in the global economy.

In addition to “traditional” contributors, the technology/-commerce/law confluence provides new challenges and opportunities, allowing, the emergence of important new players within the commercial field, such as Bolero,<sup>24</sup> which, with the backing of international banks and ship-owners, offers electronic replacements for traditional paper transactions, acting as transaction agents for the electronic substitute on behalf of the trading parties. The acceptance of the possibility of applying an institutionally offered lex has opened the door further for other actors including *ad hoc* groupings of the business community and/or universities to find ways to be engaged and actively participate in providing services for themselves and/or others in this domain.

#### 4. The foundation for transnational private contract law, arbitration

The market economy drive perpetuating economic globalisation is also active in the development and choice of transnational legal solutions. The potential reward, international sets of contract rules and principles, that can be counted on to be consistent and as

Section of the International Bar Association (IBA) with its membership of lawyers in over 180 countries. <http://www.ibanet.org/>

<sup>23</sup>For a somewhat frightening peek and illuminating discussion of the role of education in the global economy as implemented by a number of successful States see Joel Spring, *Education and the Rise of the Global Economy* (Mahwah, NJ, 1998).

<sup>24</sup><http://www.bolero.org/> also <http://www.boleroassociation.org/>

providing a uniform layer of insulation (with minimal reference back to State law) when applied across the landscape of a multitude of different municipal legal systems. The business community is free to utilise them if available, and if not, to develop them, or seek to have them developed.

17 The kernel for the development of a transnational legal infrastructure governing the rights and obligations of private contracting individuals was put in place as far back as 1958 by the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (“*NY Convention on ICA*”),<sup>25</sup> now in force in over a hundred States. Together with freedom of contract, the *NY Convention on ICA* made it possible for commercial parties to develop and be governed by their own *lex* in their contractual affairs, should they wish to do so, and guaranteed that provided their agreement was based on international commercial arbitration (“*ICA*”), (and not against relevant mandatory law) it would be enforced in all contracting States. This has been given further support by various more recent arbitration rules and the *UNCITRAL Model Law on International Commercial Arbitration 1985*,<sup>26</sup> which now explicitly state that rule based solutions independent of national law can be applied in “*ICA*”.<sup>27</sup>

18 “*ICA*” is recognised as the most prevalent means of dispute resolution in international commerce. Unlike litigation “*ICA*” survives on its merits as a commercial service to provide for the needs of

<sup>25</sup>at <<http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/>>

<sup>26</sup>at <<http://www.jus.uio.no/lm/un.arbitration.model.law.1985/>>

<sup>27</sup>Lando, *Each Contracting Party Must Act In Accordance with Good Faith and Fair Dealing* in *Festskrift til Jan Ramberg* (Stockholm, 1997) p. 575. See also *UNIDROIT Principles*, Preamble 4 a. Also Arthur Hartkamp, *The Use of UNIDROIT Principles of International Commercial Contracts by National and Supranational Courts* (1995) in *UNIDROIT Principles: A New Lex Mercatoria?*, pp. 253-260 on p. 255. But see Goode, *A New International Lex Mercatoria?* in *Juridisk Tidsskrift* (1999-2000 nr 2) p. 256 and 259.

the business community.<sup>28</sup> It has consequently been more dynamic than national judiciaries, in adjusting to the changing requirements of businessmen. Its institutions are quicker to adapt and innovate, including the ability to cater for transnational contracts. “*ICA*”, in taking its mandate from and giving effect to the will of the parties, provides them with greater flexibility and frees them from many of the limitations of municipal law.<sup>29</sup>

19 In sum, a transnational/non-national regulatory order governing the contractual rights and obligations of private individuals is made possible by: \*(a)\* States’ acceptance of freedom of contract (public policy excepted); \*(b)\* Sanctity of contract embodied in the principle *pacta sunt servanda* \*(c)\* Written contractual selection of dispute resolution by international commercial arbitration, whether *ad hoc* or institutional, usually under internationally accepted arbitration rules; \*(d)\* Guaranteed enforcement, arbitration where necessary borrowing the State apparatus for law enforcement through the *NY Convention on ICA*, which has secured for “*ICA*” a recognition and enforcement regime unparalleled by municipal courts in well over a hundred contracting States; \*(e)\* Transnational effect or non-nationality being achievable through “*ICA*” accepting the parties’ ability to select the basis upon which the dispute would be resolved outside municipal law, such as through the selection of general principles of law or *lex mercatoria*, or calling upon the arbitrators to act as *amiable compositeur* or *ex aequo et bono*.

This framework provided by “*ICA*” opened the door for the modelling of effective transnational law default rules and principles for

<sup>28</sup>“*ICA*” being shaped by market forces and competition adheres more closely to the rules of the market economy, responding to its needs and catering for them more adequately.

<sup>29</sup>As examples of this, it seeks to give effect to the parties’ agreement upon: the *lex mercatoria* as the law of the contract; the number of, and persons to be “adjudicators”; the language of proceedings; the procedural rules to be used, and; as to the finality of the decision.

contracts independent of State participation (in their development, application, or choice of law foundation). Today we have an increased amount of certainty of content and better control over the desired degree of transnational effect or non-nationality with the availability of comprehensive insulating rules and principles such as the *PICC* or *Principles of European Contract Law* (“*European Principles*” or “*PECL*”) that may be chosen, either together with, or to the exclusion of a choice of municipal law as governing the contract. For electronic commerce a similar path is hypothetically possible.

fort<sup>30</sup> and *PICC* twenty years.<sup>31</sup> The *CISG* by *UNCITRAL* represents the greatest success for the unification of an area of substantive commercial contract law to date, being currently applied by 57 States,<sup>32</sup> estimated as representing close to seventy percent of world trade and including every major trading nation of the world apart from England and Japan. To labour the point, the USA most of the EU (along with Canada, Australia, Russia) and China, ahead of its entry to the WTO already share the same law in relation to the international sale of goods. “ScIL” however has additional hurdles to overcome. \*(a)\* In order to enter into force and become applicable, it must go through the lengthy process of ratification and accession by States. \*(b)\* Implementation is frequently with various reservations. \*(c)\* Even where widely used, there are usu-

<sup>30</sup> *UNCITRAL Convention on Contracts for the International Sale of Goods 1980* see at <<http://www.jus.uio.no/lm/un.contracts.international.sale.of.goods.convention.1980/>>

The *CISG* may be regarded as the culmination of an effort in the field dating back to Ernst Rabel, (*Das Recht des Warenkaufs* Bd. I&II (Berlin, 1936-1958). Two volume study on sales law.) followed by the Cornell Project, (Cornell Project on Formation of Contracts 1968 - Rudolf Schlesinger, Formation of Contracts. A study of the Common Core of Legal Systems, 2 vols. (New York, London 1968)) and connected most directly to the *UNIDROIT* inspired *Uniform Law for International Sales* (ULIS <<http://www.jus.uio.no/lm/unidroit.ulis.convention.1964/>> at and ULF at <<http://www.jus.uio.no/lm/unidroit.ulf.convention.1964/>> ), the main preparatory works behind the *CISG* (*Uniform Law on the Formation of Contracts for the International Sale of Goods* (ULF) and the *Convention relating to a Uniform Law on the International Sale of Goods* (ULIS) The Hague, 1964.).

<sup>31</sup> *UNIDROIT Principles of International Commercial Contracts* commonly referred to as the *UNIDROIT Principles* and within this paper as *PICC* see at <<http://www.jus.uio.no/lm/unidroit.contract.principles.1994/>> and <<http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.1994.commented/>>

The first edition of the *PICC* were finalised in 1994, 23 years after their first conception, and 14 years after work started on them in earnest.

<sup>32</sup>As of February 2000.

21 **5. “State contracted international law” and/or “institutionally offered lex”? CISG and PICC as examples**

22 An institutionally offered lex (“IoL”, uniform rules and principles) appear to have a number of advantages over “State contracted international law” (“ScIL”, model laws, treaties and conventions for enactment). The development and formulation of both “ScIL” and “IoL” law takes time, the *CISG* representing a half century of ef-

ally as many or more States that are exceptions. Success, that is by no means guaranteed, takes time and for every uniform law that is a success, there are several failures.

23 Institutionally offered lex (“IoL”) comprehensive general contract principles or contract law restatements that create an entire “legal” environment for contracting, has the advantage of being instantly available, becoming effective by choice of the contracting parties at the stroke of a pen. “IoL” is also more easily developed subsequently, in light of experience and need. Amongst the reasons for their use is the reduction of transaction cost in their provision of a set of default rules, applicable transnationally, that satisfy risk management criteria, being (or becoming) known, tried and tested, and of predictable effect.<sup>33</sup> The most resoundingly successful “IoL” example to date has been the ICC’s *Uniform Customs and Practices for Documentary Credits*, which is subscribed to as the default rules for the letters of credit offered by the vast majority of banks in the vast majority of countries of the world. Furthermore uniform principles allow unification on matters that at the present stage of national and regional pluralism could not be achieved at a treaty level. There are however, things that only “ScIL” can “engineer”, (for example that which relates to priorities and third party obligations).

24 **PICC:** The arrival of *PICC* in 1994 was particularly timely. Coinciding as it did with the successful attempt at reducing trade barriers represented by the *World Trade Agreement*,<sup>34</sup> and the start of general Internet use,<sup>35</sup> allowed for the exponential growth of elec-

tronic commerce, and further underscored the transnational tendency of commerce. The arrival of *PICC* was all the more opportune bearing in mind the years it takes to prepare such an instrument. Whilst there have been some objections, the *PICC* (and *PECL*) as contract law restatements cater to the needs of the business community that seeks a non-national or transnational law as the basis of its contracts, and provide a focal point for future development in this direction. Where in the past they would have been forced to rely on the ethereal and nebulous *lex mercatoria*, now the business community is provided with the opportunity to make use of such a “law” that is readily accessible, and has a clear and reasonably well defined content, that will become familiar and can be further developed as required. As such the *PICC* allow for more universal and uniform solutions. Their future success will depend on such factors as: \*(a)\* Suitability of their contract terms to the needs of the business community. \*(b)\* Their becoming widely known and understood. \*(c)\* Their predictability evidenced by a reasonable degree of consistency in the results of their application. \*(d)\* Recognition of their potential to reduce transaction costs. \*(e)\* Recognition of their being neutral as between different nations’ interests (East, West; North, South). In the international sale of goods the *PICC* can be used in conjunction with more specific rules and regulations, including (on parties election<sup>36</sup>) in sales the *CISG* to fill gaps in its provisions.<sup>37</sup> Provisions of the *CISG* would be given precedence over the *PICC* under the accepted prin-

<sup>33</sup> “[P]arties often want to close contracts quickly, rather than hold up the transaction to negotiate solutions for every problem that might arise.”

Honnold (1992) on p. 13.

<sup>34</sup> <<http://www.jus.uio.no/lm/wta.1994/>>

<sup>35</sup> See Amisshah, *On the Net and the Liberation of Information that wants to be Free* in ed. Jens Edvin A. Skoghoy *Fra institutt til fakultet, Jubileumsskrift i anledning av at IRV ved Universitetet i Tromsø feirer 10 år og er blitt til Det*

*juridiske fakultet* (Tromsø, 1996) pp. 59-76 or the same at

<<http://www.jus.uio.no/lm/on.the.net.and.information.22.02.1997.amissah/>>

<sup>36</sup> Also consider present and future possibilities for such use of *PICC* under *CISG* articles 8 and 9.

<sup>37</sup> Drobnig, id. p. 228, comment that the *CISG* precludes recourse to general principles of contract law in Article 7. This does not refer to the situation where parties determine that the *PICC* should do so, see *CISG* Article 6. Or that in future the *PICC* will not be of importance under *CISG* Articles 8 and 9.

principle of *specialia generalibus derogant*,<sup>38</sup> the mandatory content of the *PICC* excepted. The *CISG* has many situations that are not provided for at all, or which are provided for in less detail than the *PICC*.

25 Work on *PICC* and *PECL* under the chairmanship of Professors Bonell and Ole Lando respectively, was wisely cross-pollinated (conceptually and through cross-membership of preparatory committees), as common foundations strengthen both sets of principles. A couple of points should be noted. Firstly, despite the maintained desirability of a transnational solution, this does not exclude the desirability of regional solutions, especially if there is choice, and the regional solutions are more comprehensive and easier to keep of uniform application. Secondly, the European Union has powers and influence (within the EU) unparalleled by *UNIDROIT* that can be utilised in future with regard to the *PECL* if the desirability of a common European contract solution is recognised and agreed upon by EU member States. As a further observation, there is, hypothetically at least, nothing to prevent there in future being developed an alternative extensive (competing) transnational contract *lex* solution, though the weighty effort already in place as represented by *PICC* and the high investment in time and independent skilled legal minds, necessary to achieve this in a widely acceptable manner, makes such a development not very likely. It may however be the case that for electronic commerce, some other particularly suitable rules and principles will in time be developed in a similar vein, along the lines of an “IoL”.

## 26 6. Contract *Lex* design. Questions of commonweal

27 The virtues of freedom of contract are acknowledged in this paper

<sup>38</sup>“Special principles have precedence over general ones.” See Huet, *Synthesis* (1995) p. 277.

in that they allow the international business community to structure their business relationships to suit their requirements, and as such reflect the needs and working of the market economy. However, it is instructive also to explore the limits of the principles: freedom of contract, *pacta sunt servanda* and *caveat subscriptor*. These principles are based on free market arguments that parties best understand their interests, and that the contract they arrive at will be an optimum compromise between their competing interests. It not being for an outsider to regulate or evaluate what a party of their own free will and volition has gained from electing to contract on those terms. This approach to contract is adversarial, based on the conflicting wills of the parties, achieving a meeting of minds. It imposes no duty of good faith and fair dealing or of loyalty (including the disclosure of material facts) upon the contracting parties to one another, who are to protect their own interests. However, in international commerce, this demand can be more costly, and may have a negative and restrictive effect. Also, although claimed to be neutral in making no judgement as to the contents of a contract, this claim can be misleading.

### 6.1 The neutrality of contract law and information cost

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The information problem is a general one that needs to be recognised in its various forms where it arises and addressed where possible.

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Adherents to the *caveat subscriptor* model, point to the fact that parties have conflicting interests, and should look out for their own interests. However information presents particular problems which are exacerbated in international commerce.<sup>39</sup> As Michael Trebilcock put it: “Even the most committed proponents of free markets

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<sup>39</sup>The more straightforward cases of various types of misrepresentation apart.

and freedom of contract recognise that certain information preconditions must be met for a given exchange to possess Pareto superior qualities.”<sup>40</sup> Compared with domestic transactions, the contracting parties are less likely to possess information about each other or of what material facts there may be within the other party’s knowledge, and will find it more difficult and costly to acquire. With resource inequalities, some parties will be in a much better position to determine and access what they need to know, the more so as the more information one already has, the less it costs to identify and to obtain any additional information that is required.<sup>41</sup> The converse lot of the financially weaker party, makes their problem of high information costs (both actual and relative), near insurmountable. Ignorance may even become a rational choice, as the marginal cost of information remains higher than its marginal benefit. “This, in fact is the economic rationale for the failure to fully specify all contingencies in a contract.”<sup>42</sup> The argument is tied to transaction cost and further elucidates a general role played by underlying default rules and principles. It also extends further to the value of immutable principles that may help mitigate the problem in some circumstances. More general arguments are presented below.

## 31 6.2 Justifying mandatory loyalty principles

32 Given the ability to create alternative solutions and even an independent *lex* a question that arises is as to what limits if any should be imposed upon freedom of contract? What protective principles are required? Should protective principles be default rules that can be excluded? Should they be mandatory? Should mandatory law

<sup>40</sup>Trebilcock, (1993) p. 102, followed by a quotation of Milton Friedman, from *Capitalism and Freedom* (1962) p. 13.

<sup>41</sup>Trebilcock, (1993) p. 102, note quoted passage of Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (1988) p. 25.

<sup>42</sup>See for example Nicholas Mercurio and Steven G. Medema, p. 58

only exist at the level of municipal law?

A kernel of mandatory protective principles with regard to loyalty may be justified, as beneficial, and even necessary for “IoL” to be acceptable in international commerce, in that they (on the balance) reflect the collective needs of the international business community. The present author is of the opinion that the duties of good faith and fair dealing and loyalty (or an acceptable equivalent) should be a necessary part of any attempt at the self-legislation or institutional legislation of any contract regime that is based on “rules and principles” (rather than a national legal order). If absent a requirement for them should be imposed by mandatory international law. Such protective provisions are to be found within the *PICC* and *PECL*.<sup>43</sup> As regards *PICC* \*(a)\* The loyalty (and other protective) principles help bring about confidence and foster relations between parties. They provide an assurance in the international arena where parties are less likely to know each other and may have more difficulty in finding out about each other. \*(b)\* They better reflect the focus of the international business community on a business relationship from which both sides seek to gain. \*(c)\* They result in wider acceptability of the principles within both governments and the business community in the pluralistic international community. These protective principles may be regarded as enabling the *PICC* to better represent the needs of the commonweal. \*(d)\* Good faith and fair dealing<sup>44</sup> are fundamental underlying principles of international commercial relations. \*(e)\* Reliance only on the varied mandatory law protections of various States does not engender uniformity, which is also desirable with regard to that

<sup>43</sup>Examples include: the deliberately excluded validity (Article 4); the provision on interest (Article 78); impediment (Article 79), and; what many believe to be the inadequate coverage of battle of forms (Article 19).

<sup>44</sup>The commented *PECL* explain “‘Good faith’ means honesty and fairness in mind, which are subjective concepts... ‘fair dealing’ means observance of fairness in fact which is an objective test”.

which can be counted upon as immutable. (Not that it is avoidable, given that mandatory State law remains overriding.) More generally, freedom of contract benefits from these protective principles that need immutable protection from contractual freedom to effectively serve their function. In seeking a transnational or non-national regime to govern contractual relations, one might suggest this to be the minimum price of freedom of contract that should be insisted upon by mandatory international law, as the limitation which hinders the misuse by one party of unlimited contractual freedom. They appear to be an essential basis for acceptability of the autonomous contract (non-national contract, based on agreed rules and principles/ “IoL”). As immutable principles they (hopefully and this is to be encouraged) become the default standard for the conduct of international business and as such may be looked upon as “common property.” Unless immutable they suffer a fate somewhat analogous to that of “the tragedy of the commons.”<sup>45</sup> It should be recognised that argument over the loyalty principles should be of degree, as the concept must not be compromised, and needs to be protected (even if they come at the price of a degree of uncertainty), especially against particularly strong parties who are most likely to argue against their necessity.

## 34 7. Problems beyond uniform texts

### 35 7.1 In support of four objectives

36 In the formulation of many international legal texts a pragmatic approach was taken. Formulating legislators from different States developed solutions based on suitable responses to factual example circumstances. This was done, successfully, with a view to avoid-

<sup>45</sup>Special problem regarding common/shared resources discussed by Garrett Hardin in *Science* (1968) 162 pp. 1243-1248. For short discussion and summary see Trebilcock, (1993) p. 13-15.

ing arguments over alternative legal semantics and methodologies. However, having arrived at a common text, what then? Several issues are raised by asking the question, given that differences of interpretation can arise and become entrenched, by what means is it possible to foster a sustainable drive towards the uniform application of shared texts? Four principles appear to be desirable and should insofar as it is possible be pursued together: \*(i)\* the promotion of certainty and predictability; \*(ii)\* the promotion of uniformity of application; \*(iii)\* the protection of democratic ideals and ensuring of jurisprudential deliberation, and; \*(iv)\* the retention of efficiency.

## 7.2 Improving the predictability, certainty and uniform application of international and transnational law

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The key to the (efficient) achievement of greater certainty and predictability in an international and/or transnational commercial law regime is through the uniform application of shared texts that make up this regime.

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Obviously a distinction is to be made between transnational predictability in application, that is “uniform application”, and predictability at a domestic level. Where the “uniform law” is applied by a municipal court of State “A” that looks first to its domestic writings, there may be a clear - predictable manner of application, even if not in the spirit of the “Convention”. Another State “B” may apply the uniform law in a different way that is equally predictable, being perfectly consistent internally. This however defeats much of the purpose of the uniform law.

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A first step is for municipal courts to accept the *UN Convention on the Law of Treaties 1969* (in force 1980) as a codification of existing public international law with regard to the interpretation of

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treaties.<sup>46</sup> A potentially fundamental step towards the achievement of uniform application is through the conscientious following of the admonitions of the interpretation clauses of modern conventions, rules and principles<sup>47</sup> to take into account their international character and the need to promote uniformity in their application,<sup>48</sup> together with all this implies.<sup>49</sup> However, the problems of uniform application, being embedded in differences of legal methodology, go beyond the agreement of a common text, and superficial glances at the works of other legal municipalities. These include questions related to sources of authority and technique applied in developing valid legal argument. Problems with sources include differences in authority and weight given to: \*(a)\* legislative history; \*(b)\* rulings domestic and international; \*(c)\* official and other commentaries; \*(d)\* scholarly writings. There should be an ongoing discussion of legal methodology to determine the methods best suited to addressing the problem of achieving greater certainty, predictability and uniformity in the application of shared international legal texts. With regard to information sharing, again the technology associated with the Net offers potential solutions.

<sup>46</sup>This is the position in English law see Lord Diplock in *Fothergill v Monarch Airlines* [1981], A.C. 251, 282 or see <[http://www.jus.uio.no/lm/england.fothergill.v.monarch.airlines.hl.1980/2\\_diplock.html](http://www.jus.uio.no/lm/england.fothergill.v.monarch.airlines.hl.1980/2_diplock.html)> also Mann (London, 1983) at p. 379. The relevant articles on interpretation are Article 31 and 32.

<sup>47</sup>Examples: The *CISG*, Article 7; The *PICC*, Article 1.6; *PECL* Article 1.106; *UN Convention on the Carriage of Goods by Sea (The Hamburg Rules) 1978*, Article 3; *UN Convention on the Limitation Period in the International Sale of Goods 1974 and 1978*, Article 7; *UN Model Law on Electronic Commerce 1996*, Article 3; *UNIDROIT Convention on International Factoring 1988*, Article 4; *UNIDROIT Convention on International Financial Leasing 1988*, Article 6; also *EC Convention on the Law Applicable to Contractual Obligations 1980*, Article 18.

<sup>48</sup>For an online collection of articles see the Pace *CISG* Database <<http://www.cisg.law.pace.edu/cisg/text/e-text-07.html>> and amongst the many other articles do not miss Michael Van Alstine *Dynamic Treaty Interpretation* 146 *University of Pennsylvania Law Review* (1998) 687-793.

<sup>49</sup>Such as the *CISG* provision on interpretation - Article 7.

### 7.3 The Net and information sharing through transnational databases

The Net has been a godsend permitting the collection and dissemination of information on international law. With the best intentions to live up to admonitions to “to take into account their international character and the need to promote uniformity in their application” of “ScIL” and “IoL”, a difficulty has been in knowing what has been written and decided elsewhere. In discussing solutions, Professor Honnold in “*Uniform Words and Uniform Application*”<sup>50</sup> suggests the following: “General Access to Case-Law and Bibliographic Material: The development of a homogenous body of law under the Convention depends on channels for the collection and sharing of judicial decisions and bibliographic material so that experience in each country can be evaluated and followed or rejected in other jurisdictions.” Honnold then goes on to discuss “the need for an international clearing-house to collect and disseminate experience on the Convention” the need for which, he writes there is general agreement. He also discusses information-gathering methods through the use of national reporters. He poses the question “Will these channels be adequate? ...”

The Net, offering inexpensive ways to build databases and to provide global access to information, provides an opportunity to address these problems that was not previously available. The Net extends the reach of the admonitions of the interpretation clauses. Providing the medium whereby if a decision or scholarly writing ex-

<sup>50</sup>Based on the *CISG*, and inputs from several professors from different legal jurisdictions, on the problems of achieving the uniform application of the text across different legal municipalities. J. Honnold, *Uniform words and uniform applications. Uniform Words and Uniform Application: The 1980 Sales Convention and International Juridical Practice. Einheitliches Kaufrecht und nationales Obligationenrecht. Referate Diskussionen der Fachtagung*. am 16/17-2-1987. Hrsg. von P. Schlechtriem. Baden-Baden, Nomos, 1987. p. 115-147, at p. 127-128.

ists on a particular article or provision of a Convention, anywhere in the world, it will be readily available. Whether or not a national court or arbitration tribunal chooses to follow their example, they should be aware of it. Whatever a national court decides will also become internationally known, and will add to the body of experience on the Convention.<sup>51</sup>

44 Such a library would be of interest to the institution promulgating the text, governments, practitioners and researchers alike. It could place at your fingertips: \*(a)\* Convention texts. \*(b)\* Implementation details of contracting States. \*(c)\* The legislative history. \*(d)\* Decisions generated by the convention around the world (court and arbitral where possible). \*(e)\* The official and other commentaries. \*(f)\* Scholarly writings on the Convention. \*(g)\* Bibliographies of scholarly writings. \*(h)\* Monographs and textbooks. \*(i)\* Student study material collections. \*(j)\* Information on promotional activities, lectures - moots etc. \*(k)\* Discussion groups/ mailing groups and other more interactive features.

45 With respect to the *CISG* such databases are already being maintained.<sup>52</sup>

46 The database by ensuring the availability of international materials,

<sup>51</sup>Nor is it particularly difficult to set into motion the placement of such information on the Net. With each interested participant publishing for their own interest, the Net could provide the key resources to be utilised in the harmonisation and reaching of common understandings of solutions and uniform application of legal texts. Works from all countries would be available.

<sup>52</sup>Primary amongst them Pace University, Institute of International Commercial Law, *CISG* Database <<http://www.cisg.law.pace.edu/>> which provides secondary support for the *CISG*, including providing a free on-line database of the legislative history, academic writings, and case-law on the *CISG* and additional material with regard to *PICC* and *PECL* insofar as they may supplement the *CISG*. Furthermore, the Pace *CISG* Project, networks with the several other existing Net based "autonomous" *CISG* projects. *UNCITRAL* under Secretary Gerold Herrmann, has its own database through which it distributes its case law materials collected from national reporters (CLOUT).

used in conjunction with legal practice, helps to support the fore-named four principles. That of efficiency is enhanced especially if there is a single source that can be searched for the information required.

The major obstacle that remains to being confident of this as the great and free panacea that it should be is the cost of translation of texts. 47

#### 7.4 Judicial minimalism promotes democratic jurisprudential deliberation 48

How to protect liberal democratic ideals and ensure international jurisprudential deliberation? Looking at judicial method, where court decisions are looked to for guidance, liberal democratic ideals and international jurisprudential deliberation are fostered by a judicial minimalist approach. 49

For those of us with a common law background, and others who pay special attention to cases as you are invited to by interpretation clauses, there is scope for discussion as to the most appropriate approach to be taken with regard to judicial decisions. US judge Cass Sunstein suggestion of judicial minimalism<sup>53</sup> which despite its being developed in a different context<sup>54</sup> is attractive in that it is suited to a liberal democracy in ensuring democratic jurisprudential deliberation. It maintains discussion, debate, and allows for adjustment as appropriate and the gradual development of a common understanding of issues. Much as one may admire farsighted and far-reaching decisions and expositions, there is less chance with the minimalist approach of the (dogmatic) imposition of particular values. Whilst information sharing offers the possibility of the percolation of good 50

<sup>53</sup>Cass R. Sunstein, *One Case at a Time - Judicial Minimalism on the Supreme Court* (1999)

<sup>54</sup>His analysis is developed based largely on "hard" constitutional cases of the U.S.

ideas.<sup>55</sup> Much as we admire the integrity of Dworkin's Hercules,<sup>56</sup> that he can consistently deliver single solutions suitable across such disparate socio-economic cultures is questionable. In examining the situation his own "integrity" would likely give him pause and prevent him from dictating that he can.<sup>57</sup> This position is maintained as a general principle across international commercial law, despite private (as opposed to public) international commercial law not being an area of particularly "hard" cases of principle, and; despite private international commercial law being an area in which over a long history it has been demonstrated that lawyers are able to talk a common language to make themselves and their concepts (which are not dissimilar) understood by each other.<sup>58</sup>

<sup>55</sup>D. Stauffer, *Introduction to Percolation Theory* (London, 1985).

Percolation represents the sudden dramatic expansion of a common idea or ideas thought he reaching of a critical level/mass in the rapid recognition of their power and the making of further interconnections. An epidemic like infection of ideas. Not quite the way we are used to the progression of ideas within a conservative tradition.

<sup>56</sup>Ronald Dworkin, *Laws Empire* (Harvard, 1986); *Hard Cases in Harvard Law Review* (1988).

<sup>57</sup>Hercules was created for U.S. Federal Cases and the community represented by the U.S.

<sup>58</sup>In 1966, a time when there were greater differences in the legal systems of States comprising the world economy Clive Schmitthoff was able to comment that:

"22. The similarity of the law of international trade transcends the division of the world between countries of free enterprise and countries of centrally planned economy, and between the legal families of the civil law of Roman inspiration and the common law of English tradition. As a Polish scholar observed, "the law of external trade of the countries of planned economy does not differ in its fundamental principles from the law of external trade of other countries, such as e.g., Austria or Switzerland. Consequently, international trade law specialists of all countries have found without difficulty that they speak a 'common language'

23. The reason for this universal similarity of the law of international trade is that this branch of law is based on three fundamental propositions: first, that the parties are free, subject to limitations imposed by the national laws, to

## 7.5 Non-binding interpretative councils and their co-ordinating guides can provide a focal point for the convergence of ideas - certainty, predictability, and efficiency

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A respected central guiding body can provide a guiding influence with respect to: \*(a)\* the uniform application of texts; \*(b)\* information management control. Given the growing mass of writing on common legal texts - academic and by way of decisions, we are faced with an information management problem.<sup>59</sup>

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Supra-national interpretative councils have been called for previously<sup>60</sup> and have for various reasons been regarded impracticable to implement including problems associated with getting States to formally agree upon such a body with binding authority.

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However it is not necessary to go this route. In relation to "IoL" in such forms as the *PICC* and *PECL* it is possible for the pro-

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contract on whatever terms they are able to agree (principle of the autonomy of the parties' will); secondly, that once the parties have entered into a contract, that contract must be faithfully fulfilled (*pacta sunt servanda*) and only in very exceptional circumstances does the law excuse a party from performing his obligations, viz., if force majeure or frustration can be established; and, thirdly that arbitration is widely used in international trade for the settlement of disputes, and the awards of arbitration tribunals command far-reaching international recognition and are often capable of enforcement abroad."

*Report of the Secretary-General of the United Nations, Progressive Development of the Law of International Trade* (1966). Report prepared for the UN by C. Schmitthoff.

<sup>59</sup>Future if not current.

<sup>60</sup>*UNCITRAL Secretariat* (1992) p. 253. Proposed by David (France) at the second *UNCITRAL* Congress and on a later occasion by Farnsworth (USA). To date the political will backed by the financing for such an organ has not been forthcoming. In 1992 the *UNCITRAL* Secretariat concluded that "probably the time has not yet come". Suggested also by Louis Sono in *Uniform laws require uniform interpretation: proposals for an international tribunal to interpret uniform legal texts* (1992) 25th *UNCITRAL* Congress, pp. 50-54. Drobnič, *Observations in Uniform Law in Practice* at p. 306.

mulgators themselves,<sup>61</sup> to update and clarify the accompanying commentary of the rules and principles, and to extend their work, through having councils with the necessary delegated powers. In relation to the *CISG* it is possible to do something similar of a non-binding nature, through the production of an updated commentary by an interpretive council (that could try to play the role of Hercules).<sup>62</sup> With respect, despite some expressed reservations, it is not true that it would have no more authority than a single author writing on the subject. A suitable non-binding interpretative council would provide a focal point for the convergence of ideas. Given the principle of ensuring democratic jurisprudential deliberation, that such a council would be advisory only (except perhaps on the contracting parties election) would be one of its more attractive features, as it would ensure continued debate and development.

## 55 7.6 Capacity Building

56 “... one should create awareness about the fact that an international contract or transaction is not naturally rooted in one particular domestic law, and that its international specifics are best catered for in a uniform law.”<sup>63</sup>

57 *Capacity building* - raising awareness, providing education, creating a new generation of lawyers versed in a relatively new paradigm. Capacity building in international and transnational law, is some-

<sup>61</sup> *UNIDROIT* and the EU

<sup>62</sup>For references on interpretation of the *CISG* by a supranational committee of experts or council of “wise men” see Bonell, *Proposal for the Establishment of a Permanent Editorial Board for the Vienna Sales Convention in International Uniform Law in Practice/ Le droit uniforme international dans la pratique [Acts and Proceedings of the 3rd Congress on Private Law held by the International Institute for the Unification of Private Law (Rome, 1987)]*, (New York, 1988) pp. 241-244

<sup>63</sup> *UNCITRAL Secretariat* (1992) p. 255.

thing relevant institutions including arbitration institutions; the business community, and; far sighted States, should be interested in promoting. Finding means to transcend national boundaries is also to continue in the tradition of seeking the means to break down barriers to legal communication and understanding. However, while the business community seeks and requires greater uniformity in their business relations, there has paradoxically, at a national level, been a trend towards a nationalisation of contract law, and a regionalisation of business practice.<sup>64</sup>

As an example, Pace University, Institute of International Commercial Law, plays a prominent role with regard to capacity building in relation to the *CISG* and *PICC*. Apart from the previously mentioned *CISG Database*, Pace University organise a large annual moot on the *CISG*<sup>65</sup> this year involving students of 79 universities from 28 countries, and respected arbitrators from the word over. Within the moot the finding of solutions based on *PICC* where the *CISG* is silent, is encouraged. Pace University also organise an essay competition<sup>66</sup> on the *CISG* and/or the *PICC*, which next year is to be expanded to include the *PECL* as a further option.

## 8. Marketing of transnational solutions

Certain aspects of the Net/web may already be passé, but did you recognise it for what it was, or might become, when it arrived?

As uniform law and transnational solutions are in competition with municipal approaches, to be successful a certain amount of marketing is necessary and may be effective. The approach should involve ensuring the concept of what they seek to achieve is firmly

<sup>64</sup>Erich Schanze, *New Directions in Business Research* in Børge Dahl & Ruth Nielsen (ed.), *New Directions in Contract Research* (Copenhagen, 1996) p. 62.

<sup>65</sup>See <<http://www.cisg.law.pace.edu/vis.html>>

<sup>66</sup>See <<http://www.cisg.law.pace.edu/cisg/text/essay.html>>

implanted in the business, legal and academic communities, and through engaging the business community and arbitration institutions, in capacity building and developing a new generation of lawyers. Feedback from the business community, and arbitrators will also prove invaluable. Whilst it is likely that the business community will immediately be able to recognise their potential advantages, it is less certain that they will find the support of the legal community. The normal reasons would be similar to those usually cited as being the primary constraints on its development “conservatism, routine, prejudice and inertia” René David. These are problems associated with gaining the initial foothold of acceptability, also associated with the lower part of an exponential growth curve. In addition the legal community may face tensions arising for various reasons including the possibility of an increase in world-wide competition.

62 There are old well developed legal traditions with developed infrastructures and roots well established in several countries, that are dependable and known. The question arises why experiment with alternative non-extensively tested regimes? The required sophistication is developed in the centres providing legal services, and it may be argued that there is not the pressing need for unification or for transnational solutions, as the traditional way of contracting provides satisfactorily for the requirements of global commerce. The services required will continue to be easily and readily available from existing centres of skill. English law, to take an example is for various reasons (including perhaps language, familiarity of use, reputation and widespread Commonwealth<sup>67</sup> relations) the premier choice for the law governing international commercial transactions, and is likely to be for the foreseeable future. Utilising the Commonwealth as an example, what the “transnational” law (e.g. *CISG*) experience illustrates however, is that for States there may be greater

<sup>67</sup> <<http://www.thecommonwealth.org/>>

advantage to be gained from participation in a horizontally shared area of commercial law, than from retaining a traditional vertically integrated commercial law system, based largely for example on the English legal system.

Borrowing a term from the information technology sector, it is essential to guard against FUD (fear, uncertainty and doubt) with regard to the viability of new and/or competing transnational solutions, that may be spread by their detractors, and promptly, in the manner required by the free market, address any real problems that are discerned. 63

## 9. Tools in future development 64

An attempt should be made by the legal profession to be more contemporary and to keep up to date with developments in technology and the sciences, and to adopt effective tools where suitable to achieve their goals. Technology one way or another is likely to encroach further upon law and the way we design it. 65

Science works across cultures and is aspired to by most nations as being responsible for the phenomenal success of technology (both are similarly associated with globalisation). Science is extending its scope to (more confidently) tackle complex systems. It would not hurt to be more familiar with relevant scientific concepts and terminology. Certainly lawyers across the globe, myself included, would also benefit much in their conceptual reasoning from an early dose of the philosophy of science,<sup>68</sup> what better than Karl Popper on scientific discovery and the role of “falsification” and value of predictive probity.<sup>69</sup> And certainly Thomas Kuhn on scientific 66

<sup>68</sup> An excellent approachable introduction is provided by A.F. Chalmers *What is this thing called Science?* (1978, Third Edition 1999).

<sup>69</sup> Karl R. Popper *The Logic of Scientific Discovery* (1959).

advancement and “paradigm shifts”<sup>70</sup> has its place. Having mentioned Karl Popper, it would not be unwise to go further (outside the realms of philosophy of science) to study his defence of democracy in both volumes of *Open Society and Its Enemies*.<sup>71</sup>

67 Less ambitiously there are several tools not traditionally in the lawyers set, that may assist in transnational infrastructure modelling. These include further exploration and development of the potential of tools, including to suggest a few by way of example: flow charts, fuzzy thinking, “intelligent” electronic agents and Net collaborations.

68 In the early 1990’s I was introduced to a quantity surveyor and engineer who had reduced the *FIDIC Red Book*<sup>72</sup> to over a hundred pages of intricate flow charts (decision trees), printed horizontally on roughly A4 sized sheets. He was employed by a Norwegian construction firm, who insisted that based on past experience, they knew that he could, using his charts, consistently arrive at answers to their questions in a day, that law firms took weeks to produce. Flow charts can be used to show interrelationships and dependencies, in order to navigate the implications of a set of rules more quickly. They may also be used more pro-actively (and *ex ante* rather than *ex post*) in formulating texts, to avoid unnecessary complexity and to arrive at more practical, efficient and elegant solutions.

69 Explore such concepts as “fuzzy thinking”<sup>73</sup> including fuzzy logic, fuzzy set theory, and fuzzy systems modelling, of which classical

<sup>70</sup>Thomas S. Kuhn *The Structure of Scientific Revolutions* (1962, 3rd Edition 1976).

<sup>71</sup>Karl R. Popper *The Open Society and Its Enemies: Volume 1, Plato* (1945) and *The Open Society and Its Enemies: Volume 2, Hegel & Marx*. (1945)

<sup>72</sup>FIDIC is the International Federation of Consulting Engineers

<<http://www.fidic.com/>>

<sup>73</sup>Concept originally developed by Lotfi Zadeh *Fuzzy Sets* Information Control 8 (1965) pp 338-353. For introductions see Daniel McNeill and Paul Freiberger *Fuzzy Logic: The Revolutionary Computer Technology that is*

logic and set theory are subsets. Both by way of analogy and as a tool fuzzy concepts are better at coping with complexity and map more closely to judicial thinking and argument in the application of principles and rules. Fuzzy theory provides a method for analysing and modelling principle and rule based systems, even where conflicting principles may apply permitting *inter alia* working with competing principles and the contextual assignment of precision to terms such as “reasonableness”. Fuzzy concepts should be explored in expert systems, and in future law. Problems of scaling associated with multiple decision trees do not prevent useful applications, and structured solutions. The analysis assists in discerning what lawyers are involved with.

“Intelligent” electronic agents can be expected both to gather information on behalf of the business community and lawyers. In future electronic agents are likely to be employed to identify and bring to the attention of their principals “invitations to treat” or offers worthy of further investigation. In some cases they will be developed and relied upon as electronic legal agents, operating under a programmed mandate and vested with the authority to enter certain contracts on behalf of their principals. Such mandate would include choice of law upon which to contract, and the scenario could be assisted by transnational contract solutions (and catered for in the design of “future law”).

*Changing our World* (1993); Bart Kosko *Fuzzy Thinking* (1993); Earl Cox *The Fuzzy Systems Handbook* (New York, 2nd ed. 1999). Perhaps to the uninitiated an unfortunate choice of name, as fuzzy logic and fuzzy set theory is more precise than classical logic and set theory, which comprise a subset of that which is fuzzy (representing those instances where membership is 0% or 100%). The statement is not entirely without controversy, in suggesting the possibility that classical thinking may be subsumed within the realms of an unfamiliar conceptual paradigm, that is to take hold of the future thinking. In the engineering field much pioneer work on fuzzy rule based systems was done at Queen Mary College by Ebrahim Mamdani in the early and mid-1970s. Time will tell.

71 Another area of technology helping solve legal problems relates to various types of global register and transaction centres. Amongst them property registers being an obvious example, including patents and moveable property. Bolero providing an example of how electronic documents can be centrally brokered on behalf of trading parties.

72 Primary law should be available on the Net free, and this applies also to “IoL” and the static material required for their interpretation. This should be the policy adopted by all institutions involved in contributing to the transnational legal infrastructure. Where possible larger databases also should be developed and shared. The Net has reduced the cost of dissemination of material, to a level infinitesimally lower than before. Universities now can and should play a more active role. Suitable funding arrangements should be explored that do not result in proprietary systems or the forwarding of specific lobby interests. In hard-copy to promote uniform standards, institutions should also strive to have their materials available at a reasonable price. Many appear to be unacceptably expensive given the need for their promotion and capacity building, amongst students, and across diverse States.

73 Follow the open standards and community standards debate in relation to the development of technology standards and technology infrastructure tools - including operating systems,<sup>74</sup> to discover what if anything it might suggest for the future development of law standards.

## 74 10. As an aside, a word of caution

75 I end with an arguably gratuitous observation, by way of a re-

<sup>74</sup>See for example *Open Sources : Voices from the Open Source Revolution - The Open Source Story*

<<http://www.oreilly.com/catalog/opensources/book/toc.html>>

minder and general warning. Gratuitous in the context of this paper because the areas focused upon<sup>75</sup> were somewhat deliberately selected to fall outside the more contentious and “politically” problematic areas related to globalisation, economics, technology, law and politics.<sup>76</sup> Gratuitous also because there will be no attempt to concretise or exemplify the possibility suggested.

Fortunately, we are not (necessarily) talking about a zero sum game, however, it is necessary to be able to distinguish and recognise that which may harm. International commerce/trade is competitive, and by its nature not benign, even if it results in an overall improvement in the economic lot of the peoples of our planet. “Neutral tests” such as Kaldor-Hicks efficiency, do not require that your interests are benefited one iota, just that whilst those of others are improved, yours are not made worse. If the measure adopted is overall benefit, it is even more possible that an overall gain may result where your interests are adversely affected. The more so if you have little, and those that gain, gain much. Furthermore such “tests” are based on assumptions, which at best are approximations of reality (e.g. that of zero transaction costs, where in fact not only are they not, but they are frequently proportionately higher for the economically weak). At worst they may be manipulated *ex ante* with knowledge of their implications (e.g. engineering to ensure actual or relative<sup>77</sup> asymmetrical transaction cost). It is important to be careful in a wide range of circumstances related to various aspects of the modelling of the infrastructure for international commerce that have an impact on the allocation of rights and obligations, and especially the allocation of resources, including

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<sup>75</sup>Sale of goods (*CISG*), contract rules and principles (*PICC*), related Arbitration, and the promotion of certain egalitarian ideals.

<sup>76</sup>It is not as evident in the area of private international commercial contract law the chosen focus for this paper, but appears repeatedly in relation to other areas and issues arising out of the economics, technology, law nexus.

<sup>77</sup>Low fixed costs have a “regressive” effect

various types of intellectual property rights. Ask what is the objective and justification for the protection? How well is the objective met? Are there other consequential effects? Are there other objectives that are worthy of protection? Could the stated objective(s) be achieved in a better way?

77 Within a system are those who benefit from the way it has been, that may oppose change as resulting in loss to them or uncertainty of their continued privilege. For a stable system to initially arise that favours such a Select Set, does not require the conscious manipulation of conditions by the Select Set. Rather it requires that from the system (set) in place the Select Set emerges as beneficiary. Subsequently the Select Set having become established as favoured and empowered by their status as beneficiary, will seek to do what it can, to influence circumstances to ensure their continued beneficial status. That is, to keep the system operating to their advantage (or tune it to work even better towards this end), usually with little regard to the conditions resulting to other members of the system. Often this will be a question of degree, and the original purpose, or an alternative “neutral” argument, is likely to be used to justify the arrangement. The objective from the perspective of the Select Set is fixed; the means at their disposal may vary. Complexity is not required for such situations to arise, but having done so subsequent plays by the Select Set tend towards complexity. Furthermore, moves in the interest of the Select Set are more easily obscured/disguised in a complex system. Limited access to information and knowledge are devastating handicaps without which change cannot be contemplated let alone negotiated. Frequently, having information and knowledge are not enough. The protection of self-interest is an endemic part of our system, with the system repeatedly being co-opted to the purposes of those that are able to manipulate it. Membership over time is not static, for example, yesterday’s “copycat nations” are today’s innovators, and keen to protect their intellectual property. Which also illustrates the

point that what it may take to set success in motion, may not be the same as that which is preferred to sustain it. Whether these observations appear to be self-evident and/or abstract and out of place with regard to this paper, they have far reaching implications repeatedly observable within the law, technology, and commerce (politics) nexus. Even if not arising much in the context of the selected material for this paper, their mention is justified by way of warning. Suitable examples would easily illustrate how politics arises inescapably as an emergent property from the nexus of commerce, technology, and law.<sup>78</sup>

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<sup>78</sup>In such circumstances either economics or law on their own would be sufficient to result in politics arising as an emergent property.

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